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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-377

NEW JERSEY MANUFACTURERS INSURANCE COMPANY,

Petitioner,

vs.

MOTOR CLUB FIRE & CASUALTY CO. and FRANCES SCIBETTA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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IN THE

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

The petitioner, New Jersey Manufacturers, as a defendant herein, petitions for a writ of certiorari to review the judgment of the New Jersey Supreme Court.

Opinions Below

The opinion from which review is sought is reported at 73 N.J. 425, 375 A.2d 639 (1977). It reversed a previous

opinion of the Supreme Court in this case reported at 71 N.J. 352, 365 A.2d 195 (1976), which previous opinion affirmed a decision of the Appellate Division reported at 135 N.J. Super. 362, 343 A.2d 473 (1975). That opinion reversed the unreported opinion of the Chancery Division of the Superior Court. Said opinions are appended hereto as appendices A, C, D, and E respectively.

Jurisdiction

The judgment sought to be reviewed was dated and entered on June 13, 1977.[1] The Petition is timely pursuant to 28 U.S.C.A. 2101(c).

The jurisdiction of this Court is invoked under 28 U.S.C.A. §1257(3).

Questions Presented for Review

(i) Is the legislative directive of N.J.S.A. 39:6-46 requiring the abrogation of the clear language and intent of the "omnibus clause" of the insurance contract violative of the United States Constitution, Article I, §10, cl. 1?

(ii) Is the judicial-legislative impairment of contract, which here occurred reasonable and necessary to serve the purpose of the State of New Jersey in legislating mandatory motor vehicle financial responsibility coverage?

(iii) Does the judgment of the Supreme Court of New Jersey, which by its terms and necessary operation,

[1] The opinion of the New Jersey Supreme Court constitutes its judgment. N.J. Court Rules 2:11-3(b).

gives present force and effect to N.J.S.A. 39:6-46, impair the constitutional right of contract?

(iv) Did the grant of rehearing after final judgment by the Supreme Court and the subsequent reversal by the Court of its prior decision deprive the petitioner of due process and equal protection of the laws?

The Constitutional Provisions

U. S. Constitution, Article 1, §10, cl. 1:

> "No state shall . . . pass any . . . law impairing the obligation of contracts . . ."

U. S. Constitution, Amendment V:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

U. S. Constitution, Amendment 14, §1:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

The pertinent facts are recited at 73 N.J. 429 (Pa3 to 4). On August 26, 1971, Jennie Leonard, the named insured on a New Jersey Manufacturers policy, was operating her motor vehicle. Nicholas Scibetta and Frances Scibetta, his mother, were riding as passengers. Suddenly Nick

began climbing over his mother, grabbed the steering wheel and told Mrs. Leonard to get out of the car. Stunned and frightened, she exited. After this "coerced ouster" and "unauthorized seizure and operation," 135 N.J. Super. 362, 371 (Pa35), Nicholas Scibetta took the wheel, drove the vehicle, struck the rear of another vehicle, went out of control and crashed into an office building. Frances Scibetta, his mother, sustained serious injuries in the accident.

Nicholas Scibetta was the named insured on the Motor Club policy. That policy concededly provided coverage to Nicholas Scibetta regardless of permission to operate. Under the law of New Jersey, if Nicholas Scibetta had the permission of Jennie Leonard to operate her vehicle, her insurance coverage would be primary.

The insurance policy issued to Jennie Leonard by New Jersey Manufacturers contained the standard omnibus clause. It provides:

> "The following are insureds under Part 1:
>
> (a) with respect to the owned automobile,
>
> (1) the named insured and any resident of the same household,
>
> (2) any other person using such automobile with the permission of the named insured, provided his actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission."

There can be no dispute that the contract clause required the named insured's permission to operate if the operator was to be an additional insured. The insurance contract

placed in the hands of the named insured the right to extend her contract to another. Absent such permission, there was no contractual coverage under the named insured's policy extended to a driver who was not a resident of the same household.

This action was brought in the state courts of New Jersey to determine the respective contractual rights and duties of parties and/or third party beneficiaries with respect to the two insurance policies. It was conceded following the chancery trial that the insurance policy issued by Motor Club provided coverage to its named insured, Nicholas Scibetta. The single issue on appeal was whether the New Jersey Manufacturers automobile policy afforded coverage to Nicholas Scibetta under its omnibus clause and thus provided primary coverage.

The Appellate Division rejected all arguments raised and enforced the insurance contract as written. The Supreme Court of New Jersey granted certification and affirmed the Appellate Division. Motor Club and Frances Scibetta, moved for rehearing and the motion was granted (Pa22). Upon rehearing, the Supreme Court of New Jersey determined that N.J.S.A. 39:6-46 operated as a legislative directive to abrogate the omnibus clause.

The parties to the insurance contract at issue, namely, New Jersey Manufacturers and Jennie Leonard, have simply sought to enforce the plain provisions of that contract. The contract has been determined to be unambiguous. 135 N.J. Super. at 371, Pa35. By its clear terms, it had been interpreted by the Appellate Division, 135 N.J. Super. at 371 and affirmed by the New Jersey Supreme Court, 71 N.J. 352, to preclude the assertion by Nicholas Scibetta, a non-party to the contract, that he is entitled to omnibus insurance protection pursuant to the

"omnibus clause" of that contract. 71 N.J. at 353. Nonetheless, in the subsequent opinion here under review the same court interpreted N.J.S.A. 39:6-46[2] as a legislative directive to abrogate the clear meaning and intent of the "omnibus clause" of the contract. It is respectfully submitted that the reversal of its previous opinion based on such legislative direction is violative of the constitutional proscription against impairment of the obligations of contract.

---

[2] The Motor Vehicle Security-Responsibility Law, N.J.S.A. 39:6-46, provides:

> Liability policies; requirements
>
> A motor vehicle liability policy furnished as proof of financial responsibility as provided herein shall be a policy of liability insurance issued by an insurance carrier authorized to transact business in this State or, in the case of a person not eligible for insurance under the automobile Assigned Risk Plan, by an eligible surplus lines insurer to the person therein named as insured, or in the case of a nonresident, by an insurance carrier authorized to transact business in any of the states or provinces hereinafter stated. The policy shall:
>
> (a) Designate, by explicit description or appropriate reference, all motor vehicles with respect to which coverage is intended to be granted thereby, and insure the insured named therein and any other person using or responsible for the use of any such motor vehicle with the express or implied consent of the insured, against loss from the liability imposed upon the insured or other person by law, for injury to or the death of a person, other than a person who is covered, as respects the injury or death, by any workmen's compensation law, or damage to property, except property of others in charge of the insured or the insured's employees, growing out of the maintenance, use or operation of the motor vehicle in the United States of America.

The issue as stated by the majority opinion of the Supreme Court of New Jersey is as follows:

> *"The issue is therefore not what this omnibus clause provides, but what the Legislature has directed.* The Appellate Division erroneously concluded that the New Jersey Manufacturers' policy provision, precluding coverage when the vehicle was driven without the owner's permission, did not illegally depart from the statutorily required omnibus clause. *Since we hold that the New Jersey Manufacturers policy provision did impermissibly depart from the statute, it is ineffective and the statutory language controls."* (Emphasis added) (Pa12).

Justice Clifford in his dissenting opinion (joined by Justice Mountain), criticizes the majority opinion for "the straining of common language and suspension of reasoned analysis that have led to the zany result." 73 N.J. at 440 (Pa17). Unfortunately, Justice Clifford discerned "no inclination on the part of three additional members of the Court" of "rescuing" "N.J.S.A. 39:6-46, from the rigamarole" 73 N.J.at 440 (Pa17) to which it was reduced. Since the Supreme Court of New Jersey has now determined that the New Jersey legislature has "directed" the "zany result" reached by the majority of the New Jersey Supreme Court (as reconstituted for the rehearing), such judicial-legislative abrogation of contractual rights must be reviewed and declared to be unconstitutional.

At all stages of the appeal below the issue was one of contractual interpretation. The Appellate Division, at 135 N.J. Super. 362, 343 A.2d 473 (App. Div. 1975), and the Supreme Court, at 71 N.J. 352, 365 A.2d 195 (1976), initially rejected the argument that the New Jersey Statute N.J.S.A. 39:6-46 legislatively mandated coverage. Only

following rehearing in the Supreme Court did the Supreme Court strike down the contractual provision pursuant to "legislative directive." 73 N.J. 425, 375 A.2d 639 (1977). It was at that point in time that the constitutionally proscribed impairment of contract arose. It is from that final opinion that the petition arises.

ARGUMENT

1. The impairment of contract was neither reasonable nor necessary to serve the purpose of the State of New Jersey in legislating mandatory motor vehicle financial responsibility coverage.

This case presents a challenge to New Jersey Statute N.J.S.A. 39:6-46, as violative of the Contract Clause of the United States Constitution, Art. 1, §10, cl. 1. The Supreme Court of New Jersey ruled that that statute legislatively directed the striking of the contract clause known as the "omnibus clause," which clause required permission to operate as a condition to omnibus insurance coverage. This impairment effectively negates the contract and will require the *wrong* insurance carrier to pay a substantial judgment.

The ambit of the contract clause in current jurisprudence was most recently explored in *United States Trust Company of New York* v. *State of New Jersey,* 45 LW 4418, April 27, 1977. This Court observed:

> "Although the Contract Clause appears literally to proscribe 'any' impairment, this Court observed in *Blaisdell* that 'the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula.' 290 U.S., at 428. Thus,

> a finding that there has been a technical impairment is merely a preliminary step in resolving the more difficult question whether that impairment is permitted under the Constitution. In the instant case, as in *Blaisdell,* we must attempt to reconcile the strictures of the Contract Clause with the 'essential attributes of sovereign power,' *id.,* at 435, necessarily reserved by the States to safeguard the welfare of their citizens. *Id.,* at 434-440." 45 LW 4423.

The axiomatic principle which must be the fulcrum of any balancing test is set forth in that opinion at 45 LW 4425:

> "We can only sustain . . . if (the) impairment was both reasonable and necessary to serve the admittedly important purposes claimed by the state."

This Court continued by evaluating the determination of necessity on two levels. The first is whether a less drastic impairment would suffice. The second is whether the state could have adopted alternate means for achieving their goal.

> "A state is not free to impose drastic impairment when an evident and more moderate course would serve its purposes equally well." 45 LW 4425.

In the case *sub judice,* the statute in issue had been previously interpreted to require the automobile policies to provide coverage to the named insured, regardless of permission. *Selected Risks Ins. Co.* v. *Zullo,* 48 N.J. 362 (1966). Hence, in the case at bar Nicholas Scibetta's own insurance policy with Motor Club concededly provided coverage well in excess of the minimum required under New Jersey's financial responsibility laws. Furthermore, since New Jersey has compulsory automobile insurance, N.J.S.A. 39:6B-1, *every* motor vehicle operator would have

coverage in the statutorily required amount, regardless of permissive use. In a word, it is neither reasonable nor necessary to impair an individual insured's contractual right to extend or not to extend his automobile coverage to another by the extension of permission in order to effect the legislative purpose of providing mandatory insurance coverage and financial responsibility. That coverage always exists and in the prescribed legislative amount.

It is respectfully submitted that the statute (as now interpreted by the Supreme Court) which legislatively directed this impairment of contract is not "reasonable in the light of the surrounding circumstances." 45 LW 4426. In his concurring opinion, Chief Justice Burger emphasizes that it is the state's burden to "demonstrate that the impairment was essential to the achievement of an important state purpose." 45 LW 4426. It is clear that in the instant case it was not.

2. The judgment of the Supreme Court of New Jersey, by its terms and its necessary operation, gives effect to N.J.S.A. 39:6-46, which impairs the contract in issue.

It is clear that the judgment of the Supreme Court of New Jersey is based on the "legislative directive" of N.J.S.A. 39:6-46. As the Court pointed out,

> "The issue is therefore not what the omnibus clause provides, but what the legislature has directed." (Pa12).

The Petitioner recognizes the principle that the impairment clause is directed only against impairment by legislation and not against impairment by judgment of courts,

Barrows v. *Jackson,* 346 U.S. 249 (1953), *rehearing den.* 346 U.S. 841 (1953); but submits that where, as here, a state court operating under what it has deemed a "legislative directive," gives force to a statute thus impairing the contract obligation, jurisdiction of this Court attaches. *Columbia Railway Gas & Electric Co.* v. *South Carolina,* 261 U.S. 236 (1923). In essence, "it is the statute, as enforced by the State, through its courts, which impairs the contract, not the judgment of the court." *Tidal Oil Co.* v. *Flanagan,* 263 U.S. 444, 453 (1924). It is at the moment of judgment that the constitutionally proscribed impairment of contract occurs.

3. The petitioner has been deprived of due process and equal protection of the laws by the procedures utilized on the petition for rehearing, the granting of a rehearing, and the rehearing itself.

On October 20, 1976, the Supreme Court of New Jersey rendered a final judgment, affirming the unanimous Appellate Division decision. Motor Club and Scibetta petitioned pursuant to the New Jersey Court Rule 2:11-6 for rehearing. The defendants submitted a meritless, emotional petition for rehearing, grounded *solely* on the fact that the Supreme Court opinion was rendered by six rather than seven justices. This novel argument was supported by no authority. In fact, a hearing by less than a total compliment of justices is commonplace in all appellate courts. Nevertheless, the rehearing was granted.

The procedure utilized for the rehearing was to appoint a judge of the Appellate Division to sit as the seventh justice. Clearly, this seventh man would control the outcome. Since *three* Appellate Division judges had already decided the case in favor of New Jersey Manufacturers,

none of them could be selected. Clearly, New Jersey Manufacturers would be severely disadvantaged by the procedure utilized.

In effect, Scibetta and Motor Club were given two bites of the apple. It was certainly apparent at oral argument that only six justices were sitting. No objection was raised then. During the period of time between oral argument on September 28th and final disposition on October 20th, no objection was raised. If, indeed, there was any right to a seventh justice, it was clearly waived.

The Supreme Court's decision of October 20, 1976, should have been final. The rehearing was in violation of the defendant's constitutional right to due process and equal protection of the laws.

CONCLUSION

It is for the reasons stated herein and because of the great importance of the issues raised to the insurance buying public that the petitioner respectfully prays that the Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the Supreme Court of New Jersey

(Filed—June 13, 1977)

SUPREME COURT OF NEW JERSEY

A-15/16 September Term 1976

MOTOR CLUB FIRE & CASUALTY COMPANY,

Plaintiff-Respondent and Cross-Appellant,

vs.

NEW JERSEY MANUFACTURERS INSURANCE COMPANY,

Defendant-Respondent,

and

FRANCES SCIBETTA,

Defendant-Appellant.

Argued February 23, 1977.

Decided June 13, 1977.

On a rehearing of the judgment of this Court dated October 20, 1976.

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Mr. Judson L. Levin argued the cause for appellant Frances Scibetta.

Mr. Jerome S. Lieb argued the cause for respondent and cross-appellant Motor Club Fire & Casualty Company (*Messrs. Lieb, Teich and Berlin,* attorneys).

Mr. Richard D. Catenacci argued the cause for respondent New Jersey Manufacturers Insurance Company (*Messrs. McElroy, Connell, Foley & Geiser,* attorneys).

The opinion of the Court was delivered by
CARTON, P.J.A.D. (temporarily assigned).

This matter, which comes before us for the second time, involves a question of coverage under an omnibus clause of an automobile liability insurance policy. As a result of an evenly divided vote, we affirmed the Appellate Division's judgment that the policy provided no coverage for Nicholas Scibetta, the driver of the vehicle. 135 N.J. Super. 362 (App. Div. 1975), aff'd by equally divided court, 71 N.J. 352 (1976). In order to resolve this important issue, we granted rehearing, —— N.J. —— (1976).

The salient facts, although unusual, are clear and essentially undisputed.

Jennie Leonard, owner of a vehicle insured by New Jersey Manufacturers Insurance Company ("New Jersey Manufacturers"), lived in West Caldwell next door to the Scibetta family. Mr. and Mrs. Scibetta lived with their son Nick, a 37-year-old toolmaker, who was suffering from an emotional disorder apparently brought on by the news that his younger brother had contracted Hodgkin's disease. Accordingly, Nick had taken a leave of absence from work. He also owned an automobile, insured by

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Motor Club Fire and Casualty Company ("Motor Club"). That policy covered Nick as driver of his car or any other automobile.

On August 26, 1971, Jennie Leonard spent the afternoon at the Scibetta residence with Nick and his mother. Mrs. Leonard and Mrs. Scibetta were concerned about Nick's mental health. Mrs. Leonard suggested that Nick be taken to a doctor, and she volunteered to help arrange an appointment for Nick with a psychiatrist. After making several fruitless telephone calls, Mrs. Leonard made a 6:00 P.M. appointment for Nick with a Dr. Cuzzo in West Caldwell.

Although Dr. Cuzzo's office was located in the same town as the Leonard and Scibetta residences, Mrs. Leonard was unfamiliar with the exact location of the doctor's office, and she therefore decided to make a "trial run" to his office at about 3:00 P.M. Mrs. Scibetta endorsed this plan, and agreed to accompany Mrs. Leonard. Although Nick was initially reluctant to go, eventually he was persuaded to join the two women. Nick offered to drive the women in his car, but because Mrs. Leonard's car was more conveniently positioned in the Scibetta driveway, they took her car. Mrs. Leonard testified that had Nick's vehicle been in the more convenient location, he would have driven. Mrs. Leonard drove, with Mrs. Scibetta seated next to her, and Nick positioned in the right front seat by the passenger's window.

After becoming lost and asking for directions, Mrs. Leonard stopped at an angled intersection on Bloomfield Avenue and waited for a pause in the traffic. Suddenly Nick began climbing across the front, over his mother. He grabbed the steering wheel, telling Mrs. Leonard to

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get out of the car. Mrs. Leonard, stunned and frightened by Nick's actions and expression, pressed down the emergency brake and exited from the driver's side onto a traffic island in the street. Mrs. Leonard testified at trial: "I knew I had to get out • • • [b]ecause he was practically in the seat there and I knew he had the wheel." Mrs. Scibetta unsuccessfully pleaded with her son to desist. Nick succeeded in crawling across the front seat, took the wheel, and drove onto Bloomfield Avenue. Almost immediately the automobile struck the rear of another car, went out of control, and crashed into an office building. Mrs. Scibetta was severely injured.

Motor Club, Nick's insurer, instituted an action for a declaratory judgment on the issue of primary coverage, naming Nick, his mother and father, Jennie Leonard, New Jersey Manufacturers, the owner of the vehicle struck by the Leonard car, and the owners of the office building as defendants. In the action Motor Club sought to determine whether Nick was covered by either Motor Club or New Jersey Manufacturers. If he was covered by both companies, it sought a judgment declaring New Jersey Manufacturers primarily responsible. Mrs. Scibetta answered that Nick was driving with Jennie Leonard's permission and that, as a result, New Jersey Manufacturers was primarily liable. New Jersey Manufacturers denied that the Leonard policy covered Nick because his use of the vehicle was "tantamount to theft," and therefore without Mrs. Leonard's permission.

The New Jersey Manufacturers policy issued to Mrs. Leonard provided, under the heading, "PART 1—LIABILITY," sub-heading, "Coverage A—Bodily Injury Liability; Coverage B—Property Damage Liability," coverage for bodily injury "sustained by any person • • • arising out of

Appendix A

the ownership, maintenance or use of the owned vehicle • • •." Under the sub-heading, "Persons Insured," the policy reads:

> The following are insureds under Part 1:
>
> (a) with respect to the owned automobile,
>
> (1) the named insured and any resident of the same household,
>
> (2) any other person using such automobile with the permission of the named insured, provided his actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission,
>
> • • •.

As will be discussed in detail later in this opinion, this Court has held that every automobile liability policy offered as proof of financial responsibility must have coverage no more restricted than that mandated in the Motor Vehicle Security-Responsibility Law, N.J.S.A. 39:6-46, which provides:

> Liability policies: requirements
>
> A motor vehicle liability policy furnished as proof of financial responsibility as provided herein shall be a policy of liability insurance issued by an insurance carrier authorized to transact business in this State or, in the case of a person not eligible for insurance under the automobile Assigned Risk Plan, by an eligible surplus lines insurer to the person therein named as insured, or in the case of a nonresident, by an insurance carrier authorized

to transact business in any of the states or provinces hereinafter stated. The policy shall:

(a) Designate, by explicit description or appropriate reference, all motor vehicles with respect to which coverage is intended to be granted thereby, and insure the insured named therein and *any other person using or responsible for the use of any such motor vehicle with the express or implied consent of the insured*, against loss from the liability imposed upon the insured or other person by law, for injury to or the death of a person, other than a person who is covered, as respects the injury or death, by any workmen's compensation law, or damage to property, except property of others in charge of the insured or the insured's employees, *growing out of the maintenance, use or operation of the motor vehicle* in the United States of America; • • •. (Emphasis added)

As interpreted by the trial court, the New Jersey Manufacturers policy issued to Mrs. Leonard and the applicable statute rendered New Jersey Manufacturers primarily liable. The court reasoned that, at the outset of the journey, Nick was a passenger/user of the vehicle with Mrs. Leonard's permission and that Nick's use continued until the accident, although "converted or extended" into actual operation of the vehicle. The trial court did not expressly rule on the assertion that Mrs. Leonard gave Nick her permission to operate the car but found liability on the theory of agency.

The Appellate Division reversed the trial court's determination that the New Jersey Manufacturers policy afforded primary coverage to Nick as operator of Mrs.

Leonard's car. The Appellate Division viewed the "substantial issue" in the case to be whether the New Jersey Manufacturers policy covered Nick when his initial use of the car as a passenger was permitted, but was followed by his operation of the car without the owner's express permission. 135 N.J. Super. at 368-69. The court reviewed cases construing "use" as distinct from "operation," and concluded that New Jersey Manufacturers' omnibus clause, which was framed to preclude coverage of the insured vehicle when driven without the owner's permission, did not illegally depart from the statutorily required omnibus clause. Describing Nick's actions as effecting "a coerced ouster of the owner from the automobile," 135 N.J. Super. at 371, the court, exercising its original jurisdiction, found that Nick did not have Mrs. Leonard's permission to operate the car, and concluded that "the initial use was superseded by an unauthorized seizure and operation." *Id.* The Appellate Division ruled that it was not "unreasonable" under the statute and the policy language, to permit New Jersey Manufacturers to deny coverage under the Leonard policy for the injuries resulting from Nick's operation of the Leonard vehicle. *Id.*

The meaning and scope of the coverage provisions in Mrs. Leonard's policy must be considered in light of our courts' expansive view of the coverage provided by the standard omnibus clause. The leading case is *Matits* v. *Nationwide Mutual Ins. Co.*, 33 N.J. 488 (1960), where this Court, after reviewing various approaches taken by other jurisdictions for determining the coverage available to persons other than the named insured under such a provision, adopted the broadest and most liberal approach, known as the "initial permission rule." The Court formulated this rule in these words:

> • • • [I]f a person is given permission to use a motor vehicle in the first instance, any subsequent use short of theft or the like while it remains in his possession, though not within the contemplation of the parties, is a permissive use within the terms of a standard omnibus clause in an automobile liability insurance policy. • • • [33 N.J. at 496-97]

In *Small* v. *Schuncke,* 42 N.J. 407 (1964), the Court underscored the broad sweep of the coverage which its interpretation had attributed to the omnibus clause. That opinion reduced the problem of coverage available to persons other than the named insured to two fact issues: (1) whether permission had been given to use the car, and (2) whether the use constituted "theft or the like." 42 N.J. at 413. The Court took pains in *Schuncke* to reject the Appellate Division's view that the issue of coverage should depend on the purpose for which the car was given by the owner to the permittee:

> • • • We believe that this construction of the word "use" is too narrow. Whether permission to use is granted for a purpose which will benefit the owner, the permittee, or both is immaterial under the initial permission rule, which is not concerned with the scope or use for which permission is granted. • • • [42 N.J. at 413-14]

In *Odolecki* v. *Hartford Accident & Indemnity Co.,* 55 N.J. 542 (1970), the Court reviewed the circumstances which led it to adopt the initial permission rule and reaffirmed its approval of the *Matits* decision, saying:

> • • • It was our view that the minor deviation and conversion rules, which made coverage turn on the scope of permission given in the first instance, rendered coverage uncertain, fostered unnecessary litigation, and did not comport with New Jersey's legislative policy of assuring an available fund for the innocent victims of automobile accidents. See *Motor Vehicle Security-Responsibility Law,* N.J.S.A. 39:6-23 to 60; *Unsatisfied Claim and Judgment Fund Law,* N.J.S.A. 39:6-61 to 91; *Motor Vehicle Liability Security Fund Act,* N.J.S.A. 39:6-92 to 104. • • • [55 N.J. at 546]

In emphasizing the importance of minimizing litigation concerning omnibus coverage, the Court in *Odolecki* particularly decried the recurrence of intricate factual inquiries concerning the scope of permission given by the named insured. Additionally underlying the Court's entire discussion of the procedural justifications for the rule reaffirmed in *Odolecki* is the view that "• • • a liability insurance contract is for the benefit of the public as well as for the benefit of the named or additional insured • • •," 55 N.J. at 549. Accordingly, the language of any automobile liability insurance omnibus clause must be read in light of the settled legislative policy designed to provide financial compensation to those who are wrongfully injured in motor vehicle accidents. *Matits* v. *Nationwide Mutual Ins. Co., supra,* 33 N.J. at 496. See *Small* v. *Schuncke, supra,* 42 N.J. at 412; *Odolecki* v. *Hartford Accident & Indemnity Co., supra,* 55 N.J. at 549.

Although the question of Nick's coverage under the New Jersey Manufacturers policy is ultimately controlled by N.J.S.A. 39:6-46, we must first consider whether the language of the policy omnibus clause comports with the statutory requirements. The legislative provision directs

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that an automobile liability policy shall "insure the insured named therein and any other person using or responsible for the use of any such motor vehicle with the *express or implied consent* of the insured * * *." (Emphasis supplied). The New Jersey Manufacturers policy provision obligates the insurance company to provide coverage for "* * * injury sustained to any person arising out of the maintenance, ownership or use of the owned automobile" and to "any person using such automobile with the permission of the named insured; provided his actual operation or (if he is not operating) his other actual use is within the scope of such permission * * *."

The policy language differs in two respects from the statutory provision. First, the policy substitutes the phrase, "with the permission of the named insured," for the statutory language, "with the express or implied consent of the insured." This difference appears to be merely one of semantics. The word "permission" appears to us to be simply a shortcut or more informal method of expressing the idea contained in the statutory phrase, "with the express or implied consent." Although the word "permission" in general conveys the thought embodied in the statutory language, we follow the specific statutory language because it represents the precise legislative choice.

Second, unlike the statute, the policy limits coverage of the insured's permittees to a permittee whose "* * * actual operation [of the insured's vehicle] or (if he is not operating) his other actual use [of the vehicle] is within the scope of [the insured's] permission." The statute does not distinguish the use of a vehicle by its operation from other types of uses, as does the policy. Nor does it impose a requirement that the permittee's use be within the "scope" of the insured's "permission."

Appendix A

The Court, in *Indemnity Insurance Company of North America* v. *Metropolitan Casualty Insurance Company of New York,* 33 N.J. 507, 513-14 (1960), discussed the distinction between the terms "operation" and "use" as employed in omnibus clauses such as that involved here. The Court said:

> * * * The clause says nothing about *operation* of the vehicle. It is the *use* which must be permitted. * * * We think that in this context the words *use* and *operation* are not synonymous. The *use* of an automobile denotes employment for some purpose of the user; the word *"operation"* denotes the manipulation of the car's controls in order to propel it as a vehicle. *Use* is thus broader than *operation.* One who operates a car uses it * * *, but one can use a car without operating it. An automobile is being used, for example, by one riding in it although another is driving.
>
> Since in this context the words *operation* and *use* have different meanings and the omnibus clause requires only that the *use* of the automobile be with the permission of the named insured, any prohibition as to the *operation* of the automobile is immaterial to a determination of coverage. Thus, even though a driver has been expressly prohibited from *operating* the car, he is covered if the car was being *used* for a purpose permitted by the named insured. * * * (citations omitted)

When viewed in light of this discussion, it is clear that the language of the omnibus clause in the New Jersey Manufacturers policy significantly departs from that contained in the statute by limiting the statutorily mandated

coverage for persons who used the insured's vehicle in several respects.

The issue is therefore not what this omnibus clause provides, but what the Legislature has directed.[1] The Appellate Division erroneously concluded that the New Jersey Manufacturers policy provision, precluding coverage when the vehicle was driven without the owner's permission, did not illegally depart from the statutorily required omnibus clause. Since we hold that the New Jersey Manufacturers policy provision did impermissibly depart from the statute, it is ineffective and the statutory language controls. See *Selected Risks Ins. Co.* v. *Zullo,* 48 N.J. 362 (1966).

Under the Court's construction of the statute, the scope of the term "use" is broad and includes use by a passenger as well as by the operator. In a number of cases our courts have considered a remarkably wide variety of uses by passengers and other non-operating users, and whether the omnibus clause coverage must be afforded to such persons. In *Westchester Fire Ins. Co.* v. *Continental Ins. Co.,* 126 N.J. Super. 29 (App. Div. 1973), aff'd o.b. 65 N.J. 152

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[1] In *Selected Risks Ins. Co.* v. *Zullo,* 48 N.J. 362 (1966), the Court considered the relationship between the statutory language contained in the Motor Vehicle Security-Responsibility Law, N.J.S.A. 39:6-46(a), quoted above, and the scope of the coverage provided in the standard omnibus clause. The Court there said:

> * * * A policy so offered [for "proof of financial responsibility under N.J.S.A. 39:6-46 and 48] must have the broad form coverage set forth in N.J.S.A. 39:6-46(a). A policy which purports to have more restrictive omnibus coverage is automatically amended to conform to the statutory standard. N.J.S.A. 39:6-48(b). * * * [48 N.J. at 373]

(1974), a passenger threw a stick from a moving automobile and struck a passing bicyclist. The Court held that the accident arose out of the use of the automobile, and further that the negligent passenger, as a permitted user, came under the insured's liability coverage.

In *Gronquist* v. *Transit Casualty Co.,* 105 N.J. Super. 363 (Law Div. 1969), a passenger in a car was held to be covered by the insured's liability policy even though the passenger had caused the accident by leaning foward from the rear seat over the back of the front seat, interfering with the driver's operation of the car. In *Unsatisfied Claim and Judgment Fund Board* v. *Clifton,* 117 N.J. Super. 5 (App. Div. 1971), a gas station employee engaged in fixing the insured's car injured a friend of his who had been helping him guide the car to a hydraulic lift. The court held that the employee's use was a permitted one covered by the insured's policy.

In *Liberty Mutual Ins. Co.* v. *O'Rourke,* 122 N.J. Super. 68 (Ch. Div. 1973), a car had stalled and two men were assisting the driver in remedying the problem. One leaned under the hood and poured gasoline from a can into the throat of the carburetor, causing an explosion which ignited the can. He reared back and flung the gasoline can away from him and into the face of one of the driver's children. The repair activity was held to be a permitted use within the meaning of the omnibus clause in the driver's policy. Finally, in *Selected Risks Ins. Co.* v. *Nationwide Mutual Ins.,* 133 N.J. Super. 205 (App. Div. 1975), a garage owner was examining the insured's vehicle when it suddenly lurched forward, killing the garage owner and injuring the insured's wife. The court held that the estate of the deceased was covered by the insured's policy for the deceased's death because the examination of the auto was a permitted use under the insured's policy.

The issue thus becomes whether Nick's unusual behavior in taking over and driving the Leonard vehicle vitiated Mrs. Leonard's initial consent to Nick's use of her auto as a passenger, and therefore precluded coverage for the consequences of Nick's acts under her policy with New Jersey Manufacturers. In our view, the rationale developed in the "initial permission" cases fully applies to the present situation. Paraphrasing the language in *Indemnity Ins. Co. of North America* v. *Metropolitan Casualty Ins. of New York, supra,* the statute requires only that the initial use of the automobile be with the consent of the named insured. As the Court stated in *Small* v. *Schuncke, supra,* "[w]hether permission to use is granted for a purpose which will benefit the owner, the permittee, or both is immaterial under the initial permission rule, which is not concerned with the scope of use for which permission is granted." 42 N.J. at 413-14. Thus, as long as the initial use of the vehicle is with the consent, express or implied, of the insured, any subsequent changes in the character or scope of the use, such as from a passenger to a driver, do not require the additional specific consent of the insured. Only where the deviation from the use consented to amounts to "theft or the like" will coverage be precluded under the insured's policy. *Matits* v. *Nationwide Mutual Ins. Co., supra,* 33 N.J. at 496; *Small* v. *Schuncke, supra,* 42 N.J. at 413.

It is clear that Nick's initial use of the Leonard vehicle as a passenger was with the express consent of Mrs. Leonard, the named insured. The Appellate Division reasoned, however, that Nick's "ouster" of Mrs. Leonard from the car constituted an "unauthorized seizure and operation" of the vehicle, and that therefore her initial consent to his use became nugatory. *Motor Club Fire & Cas. Co. of N.J. Mfrs. Ins. Co., supra,* 135 N.J. Super. at 371. Although the Appellate Division erroneously cast its conclusion in terms of Nick's lack of expressed or implied permission to operate the Leonard car, it might be argued that Nick's conduct constituted "theft or the like" under *Matits* and *Small,* and for that reason his acts were not covered by Mrs. Leonard's policy.

The strong legislative policy which would assure financial protection to innocent victims of automobile accidents, embodied in the mandated omnibus clause and long and consistently invoked by our courts in the "initial permission" cases, applies with no less force to the present situation. The *Matits* and *Small* exclusion from coverage for those situations in which "theft or the like" has occurred must be construed narrowly in light of this expressed policy. We think that the "theft" component of the exception connotes nothing less than the willful taking of another's car with the intent permanently to deprive the owner of its possession and use. See *State* v. *Leicht,* 124 N.J. Super. 127, 131 (App. Div. 1973); *Stewart* v. *Home Fire & Marine Ins. Co.,* 2 N.J. Misc. 515, 517 (Sup. Ct. 1924); 50 *Am. Jur.* 2d, *Larceny,* §2, p. 149. While we need not exhaustively explore the scope of the "or the like" component of the exception, we think that the author of *Matits* and *Small* contemplated conduct much more like traditional theft than the conduct here involved.

Nothing in the record before us remotely suggests that Nick intended to steal Mrs. Leonard's car. Mrs. Leonard testified that she did not view Nick's acts as a "theft" of her car, and that she fully expected to see both Nick and the car again. Although Mrs. Leonard indicated that Nick's conduct startled and frightened her, she stated that Nick did not touch her or threaten her with physi-

cal injury or contact in any way. Hence, admittedly abberational conduct of the user of a vehicle, such as that here, does not constitute "theft or the like" as that term is used in *Matits* and *Small.*

Moreover, the record indicates that both the appointment to visit the psychiatrist, and the trial run to the psychiatrist's office were Mrs. Leonard's ideas, and that Nick was initially reluctant to endorse either plan. Given Nick's emotional problems, it is likely that Mrs. Leonard would reasonably have expected her policy to cover her friend Nick when, according to his testimony, he began driving the car because he wanted to return home. See *State Farm* v. *Zurich American Ins. Co.,* 62 N.J. 155, 179 (1973) (Weintraub, C.J., concurring); *Westchester Fire Ins. Co.* v. *Continental Ins. Co., supra,* 126 N.J. Super. at 36.

Nick's activities cannot be held to vitiate Mrs. Leonard's consent to his use of the automobile or to deprive him of the protection afforded by the omnibus clause of Mrs. Leonard's insurance policy. We hold that Mrs. Leonard's New Jersey Manufacturers policy covered Nick after he seized control of Mrs. Leonard's car, and that therefore New Jersey Manufacturers was primarily liable for the injuries to Mrs. Scibetta.

Reversed.

Dissenting Opinion of Clifford, J.

The Court here reaches what surely must be the outer limits of the "hell or high water" doctrine, so denominated by Justice Hall and otherwise referred to as the "initial permission" rule. *Small* v. *Schuncke,* 42 N.J. 407, 416 (1964) (Hall, J., concurring). Sharing his hankering for higher places and drier ground, I think that had I been a member of the Court during the time the "initial permission" doctrine was being formulated and developed in New Jersey, I would have shunned, as did Justice Hall, the straining of common language and suspension of reasoned analysis that have led to the zany result which application of that doctrine, now in its full-blown maturity, is said to dictate in this case. *See Baesler* v. *Globe Indemnity Co.,* 33 N.J. 148 (1960); *Matits* v. *Nationwide Mutual Ins. Co.,* N.J. 488, 498 (1960) (Hall, J., dissenting); *Indemnity Ins. Co.* v. *Metropolitan Cas. Ins. Co. of N.Y.,* 33 N.J. 507, 516 (1960) (Hall, J., dissenting); *Small* v. *Schuncke, supra,* 42 N.J. at 416 (Hall, J., concurring); *Selected Risks Ins. Co.* v. *Zullo,* 48 N.J. 362 (1966); *Odolecki* v. *Hartford Acc. & Indem. Co.,* 55 N.J. 542 (1970); *State Farm* v. *Zurich Am. Ins. Co.,* 62 N.J. 155 (1973).

However, I confess to a certain reluctance to embark on the not demonstrably profitable chore of attempting to reshape the "initial permission" rule. While I might warm to the task of rescuing both the policy and the statutory language, N.J.S.A. 39:6-46, from the rigamarole to which they have been reduced by the line of cases referred to above, I detect no present inclination on the part of a necessary three additional members of the Court to lend support to that endeavor. There appears to be little sentiment favoring re-exploration of territory long since bereft

of its virginity. Therefore, as a matter of judicial discipline and for purposes of this case, I am willing to accept as controlling, without conceding its validity, the principle announced by the majority that

> • • • as long as the initial use of the vehicle is with the consent, express or implied, of the insured, any subsequent changes in the character or scope of the use, such as from a passenger to a driver, do not require the additional specific consent of the insured. Only where the deviation from the use consented to amounts to "theft or the like" will coverage be precluded under the insured's policy. [*Ante* at (slip opinion at 14).]

But quite apart from whatever disagreement I might have with this principle, it is on the element of "theft or the like" that I think this case stumbles. While we may have long since swallowed the camel of "implied consent to use" a vehicle, we continue to strain at the gnat of "theft or the like." That handy expression—perfectly understandable, I would suppose, to a layman but apparently less so to the refined legal mind—early on found its way into the articulation of the "initial permission" rule, *Matits* v. *Nationwide Mut. Ins. Co., supra,* 33 N.J. at 497, and was perpetuated in *Small* v. *Schunke, supra,* 42 N.J. at 413. *Odolecki, supra,* simplified the inquiry even more by translating "theft or the like" into "an unlawful taking." 33 N.J. at 547. And so in this case if Nicholas Scibetta's control of Mrs. Leonard's automobile, which he was driving when the accident occurred, was achieved by "theft or the like" or if his taking over the car was "unlawful," then, as everyone readily acknowledges, coverage is not available through Mrs. Leonard's insurer, the defendant New Jersey Manufacturers Insurance Company (NJM), and the injured passenger's recovery is limited to the $50,000 provided by plaintiff, Motor Club Fire & Casualty Company (Motor Club), Nicholas Scibetta's carrier.

The majority opinion adequately states the facts pertinent to the present inquiry, *ante* at (slip opinion at 3). Let them be restated here:

> • • • Mrs. Leonard stopped at an angled intersection on Bloomfield Avenue and waited for a pause in the traffic. Suddenly Nick began climbing across the front, over his mother. He grabbed the steering wheel, telling Mrs. Leonard to get out of the car. Mrs. Leonard, stunned and frightened by Nick's actions and expression, pressed down the emergency brake and exited from the driver's side onto a traffic island in the street. Mrs. Leonard testified at trial: "I knew I had to get out • • • [b]ecause he was practically in the seat there and I knew he had the wheel." Mrs. Scibetta unsuccessfully pleaded with her son to desist. Nick succeeded in crawling across the front seat, took the wheel, and drove onto Bloomfield Avenue. Almost immediately, the automobile struck the rear of another car, went out of control, and crashed into an office building.

While the Appellate Division did not specifically characterize Nicholas' conduct as amounting to "theft or the like" or as being otherwise "unlawful," it did point out that his operation followed a "coerced ouster of the owner from the automobile" and hence was an "unauthorized seizure and operation." *Motor Club Fire & Cas. Inc. Co.* v. *N.J.Mfrs. Ins. Co.,* 135 N.J. Super. 362, 371 (App.Div.

1975). Despite this unassailed and unassailable conclusion by the court below, the majority refuses to fit the round peg of the facts into the round hole of an "unlawful taking" because, it says, the "theft" component of the exclusion from coverage connotes "nothing less than the wilfull taking of another's car with the intent permanently to deprive the owner of its possession and use * * *"; and the "or the like" component of the exception contemplates "conduct much more like traditional theft than the conduct here involved." *Ante* at ..... (slip opinion at 15). The round peg is, *mirabile dictu,* rendered square in the absence of proof of "something like" traditional theft—this, despite the fact that, as the majority puts it, Nicholas "seized control of Mrs. Leonard's car" (*ante* at (slip opinion at 17)) by bodily forcing her out of it, frightening her and scaring his own mother "stiff" in the process before driving off, leaving the owner stranded in the highway.

It may reasonably be assumed that in the present context the expression "theft or the like" was intended to set the final boundary beyond which "consent to use" a vehicle will not be stretched. The phrase "or the like" attached to "theft" is not likely to have been casually or thoughtlessly dropped into our decisional law in the first instance and mindlessly repeated in other cases thereafter. A meaning must have been ascribed to it. And if "or the like" means anything, it must mean something short of theft in the technical sense. Counsel for Motor Club conceded as much at the first oral argument before us. I would suppose (it being left by the majority entirely to supposition) that the only element of traditional theft lacking in Nicholas' conduct in the case before us is the intention *permanently,* rather than temporarily,

to deprive the owner of her vehicle. And so, it seems to me, his conduct is "like"—albeit less than—traditional theft.

Furthermore, if we are to accept *Odolecki's* dilution of "theft or the like" to "an unlawful taking," 55 N.J. at 547, then manifestly the facts of this case satisfy the requirement of unlawful conduct. For what else is an unauthorized seizure of a motor vehicle, accomplished by an assault on and coerced ouster of the owner, if not plainly unlawful? Such action, the antithesis of "permission" or "consent," amounts to a violation of N.JS.A. 2A:170-38 (Supp. 1976-77), making the unlawful taking or using of a means of conveyance a disorderly persons offense; and it seems clear that to demonstrate a violation thereof, there need not be shown any intention permanently to deprive the vehicle's owner of its use.

Finally, the majority suggests "it is likely that Mrs. Leonard would reasonably have expected her policy to cover her friend Nick when, according to his testimony, he began driving the car because he wanted to return home." *Ante* at ..... (slip opinion at 16). Quite apart from the entirely speculative nature of that gratuitous observation, unsupported by a single word in the record, its reliability as a basis for determining consent to use the vehicle in question suffers from the glaring defect of its hindsight character. See *Matits* v. *Nationwide Mut. Ins. Co., supra,* 33 N.J. at 499 (Hall, J., dissenting).

Giving the expressions "theft or the like" and "unlawful taking" their plain and generally accepted meanings, I conclude that Nicholas Scibetta's use of Mrs. Leonard's vehicle at the time of this accident was without her consent. Therefore, there was no coverage under NJM's policy and no obligation to defend.

I would affirm the judgment of the Appellate Division.

Justice Mountain joins in this dissenting opinion.

APPENDIX B

Order for Reargument

(Filed—November 30, 1976)

SUPREME COURT OF NEW JERSEY

M-240 September Term 1976

MOTOR CLUB FIRE & CASUALTY COMPANY,

Plaintiff-Respondent,

vs.

NEW JERSEY MANUFACTURERS INSURANCE COMPANY,

Defendant,

and

FRANCES SCIBETTA,

Defendant-Movant.

This matter having been duly presented to the Court, it is ORDERED that the petition for rehearing before a full court, is granted and it is further

ORDERED that this matter be set down for reargument on Monday, January 24, 1977.

Appendix B

WITNESS, the Honorable Worrall F. Mountain, Presiding Justice, at Trenton, this 30th day of November, 1976.

FLORENCE R. PESKOE
Clerk

APPENDIX C

Order of Affirmance of the Supreme Court of New Jersey

(Filed—October 20, 1976)

SUPREME COURT OF NEW JERSEY

A-15/16 September Term 1976

MOTOR CLUB FIRE & CASUALTY COMPANY,

Plaintiff-Respondent and Cross-Appellant,

vs.

NEW JERSEY MANUFACTURERS INSURANCE COMPANY,

Defendant-Respondent,

and

FRANCES SCIBETTA,

Defendant-Appellant and Cross-Respondent.

Argued September 28, 1976.

Decided October 20, 1976.

On certification to the Superior Court, Appellate Division, whose opinion is reported at 135 N.J. Super. 362 (1975).

Appendix C

Mr. Judson L. Levin argued the cause for appellant.

Mr. Jerome S. Lieb argued the cause for cross-appellant (*Messrs. Lieb, Teich and Berlin,* attorneys).

Mr. Richard D. Catenacci argued the cause for respondent (*Messrs. McElroy, Connell, Foley and Geiser,* attorneys).

PER CURIAM

The Court being equally divided, the judgment of the Appellate Division is affirmed.

APPENDIX D

***Per Curiam* Opinion of the Superior Court of New Jersey, Appellate Division**

(Filed—July 15, 1975)

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION—A-1772-73

MOTOR CLUB FIRE & CASUALTY COMPANY,

Plaintiff-Respondent,

vs.

NEW JERSEY MANUFACTURERS INSURANCE COMPANY,

Defendant-Appellant,

and

FRANCES SCIBETTA,

Defendant-Respondent.

Argued May 6, 1975.

Decided July 15, 1975.

Before Judges Matthews, Fritz and Botter.
On appeal from the Superior Court of New Jersey, Chancery Division, Essex County.

Mr. Richard D. Catenacci argued the cause for appellant New Jersey Manufacturers Insurance Company (Messrs. McElroy, Connell, Foley & Geiser, attorneys).

Mr. Jerome S. Lieb argued the cause for respondent Motor Club Fire & Casualty Co. (Messrs. Lieb, Teich & Berlin, attorneys).

Mr. Judson L. Levin argued the cause for respondent Frances Scibetta.

PER CURIAM

New Jersey Manufacturers Insurance Company (NJM) appeals from a judgment declaring that the insurance policy which it issued to Jennie V. Leonard affords primary coverage for an accident which occurred while Nicholas Scibetta (Nicholas) was driving Mrs. Leonard's automobile. At the time Nicholas owned an automobile which was insured by plaintiff, Motor Club Fire & Casualty Company (MCA), whose policy covered Nicholas while operating another vehicle. The principal questions sought to be determined in the action commenced by MCA were whether the NJM policy afforded coverage for the accident, and, if so, which policy afforded primary coverage. The problem was created when Nicholas, who had been invited into the car as a passenger, took over the operation of the car and drove off after Mrs. Leonard was frightened into leaving the car by Nicholas' unusual behavior.

There is no substantial dispute of fact. Mrs. Leonard testified in the non-jury trial below, and her prior deposition, as well as that of Nicholas and Mrs. Scibetta, were placed in evidence.

Appendix D

On August 26, 1971, Mrs. Jennie Leonard, aged 63, was a neighbor of the Scibettas, whose son Nicholas was experiencing a serious emotional disorder. Nicholas was scheduled to see a psychiatrist that night. Mrs. Leonard was going to drive him there and decided that they should look for the office in the afternoon so that she would know her way. Mrs. Leonard was driving her car, and Nicholas and his mother, who went along, were in the front seat. Mrs. Scibetta was seated between Mrs. Leonard and Nicholas.

On the trip Mrs. Leonard made a wrong turn. She stopped for directions and then returned to the correct road. Suddenly, Nicholas, in an agitated state, seized the steering wheel and started to climb over his mother toward the driver's seat. According to Mrs. Leonard's testimony he said, "Get out of this car, Jennie, get out of this car." Mrs. Leonard and Mrs. Scibetta both testified that they became very frightened. Mrs. Leonard testified, "It was like a shock. I never expected it, really." She testified that she put on the emergency brake and got out of the car because she was frightened. Mrs. Scibetta testified that she and Mrs. Leonard were "stunned" and "scared" and that Mrs. Leonard said, "Oh, my God," and stopped the car. Mrs. Scibetta kept telling Nicholas to stop but he paid no attention to her. After getting out of the car, leaving her pocketbook behind and the motor running, Mrs. Leonard just stood there; she was "stunned." She testified that Nicholas drove off and left her standing there. It all happened very fast.

Shortly after driving off, Nicholas was involved in an accident. He struck another vehicle and a building. Mrs. Scibetta was injured and commenced an action against Nicholas. Suit papers were forwarded to NJM with the

Appendix D

request that it defend Nicholas. NJM disclaimed coverage on the ground that Nicholas was not operating the vehicle with the permission of its insured. Thereafter, this action was instituted.[1]

The trial judge held that the NJM policy afforded coverage for the accident while the car was operated by Nicholas.[2] His rationale was as follows: (1) The NJM policy (as well as the MCA policy) included as "persons insured" the named insured (Mrs. Leonard), residents of her household and "any other person using" the Leonard vehicle "with the permission of the named insured, provided the actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission." (2) By the terms of the policy NJM agreed to pay "on behalf of the insured all sums which the in-

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[1] The complaint asserted that if the Leonard motor vehicle was operated by Nicholas without permission of its owner the MCA policy also would not afford coverage to Nicholas. However, this position was abandoned at trial. Counsel for MCA conceded that Nicholas was covered by the MCA policy. The MCA policy provides that the named insured (Nicholas) is an insured person with respect to a non-owned automobile. No conditions are attached to that clause; specifically, such insurance is not conditioned on the named insured having permission to operate a non-owned vehicle.

[2] The judgment entered by the court declared that the NJM policy issued to Mrs. Leonard affords primary coverage to Nicholas for the claim of his mother arising out of the automobile accident of August 26 up to the policy limit; that secondary coverage is afforded by the MCA policy issued to Nicholas up to its policy limit; that NJM must furnish the defense to Nicholas in the action pending against him arising out of the accident; and that NJM must reimburse MCA for its cost incurred theretofore in furnishing a defense to Nicholas in the aforesaid action.

sured shall become legally obligated to pay as damages • • • arising out of the ownership, maintenance or use of the • • • automobile • • •." (3) N.J.S.A. 39:6-46(a) and N.J.S.A. 39:6-48(b) require that an insurance policy insure "any other person using • • • any such motor vehicle with the express or implied consent of the insured, against loss • • • for injury • • • growing out of the maintenance, use or operation of the motor vehicle • • •." (4) Although "his [Nicholas'] use later on was converted or extended • • • into an operation • • • his use, nevertheless, continued." Accordingly, it was held that by operation of law the NJM policy was required to cover the accident resulting from the "continued use" of the vehicle by Nicholas after he became the operator of the vehicle.

Whether or not Nicholas was operating the vehicle with the permission of Mrs. Leonard was dealt with by the trial judge in the following manner: Mrs. Leonard knew that Nicholas' mental condition was "something less than stable," and, when she got out of the car, she "knew that Nicholas Scibetta was attempting to place himself in the driver's seat behind the steering wheel." The trial judge further reasoned that the driver of a vehicle is presumed in law to be operating it as the agent of the owner; that the owner must rebut that presumption; and that Mrs. Leonard did not carry the burden of persuasion that Nicholas was not driving the vehicle with her permission. The trial judge specifically stated:

> I have not decided that he was operating the vehicle with permission • • •.
>
> I have not found that she gave Nicholas Scibetta an implied consent or that he had the impied consent to operate. I haven't said that and I make no finding on the point. I said that alternative to my main decision, which went on a construction of the policy, I find that his operation was presumed in the law to be as her agent and as her agent, therefore, with her permission. I said further that because of that, you [NJM] have the burden of persuading the trier of fact that such operation was not as an agent or with implied consent. I further said you [NJM] failed to satisfy or sustain the burden.

In this case we have no difficulty in concluding that Nicholas did not have permission to operate the Leonard car. To the extent that the trial judge left the issue undecided, we exercise our authority to make a finding of fact on this issue. R.2:10-5; *Farmingdale Realty Co.* v. *Farmingdale Boro.*, 55 N.J. 103, 106 (1969). To the extent that the trial judge determined that Nicholas' permission to use the car had not been disproved, giving effect to the presumption of agency, we disagree. The presumption of agency between owner and driver (*Tischler* v. *Steinholtz*, 99 N.J.L. 149, 152 (E.&A. 1923); *Mahan* v. *Walker*, 97 N.J.L. 304, 306 (E.&A. 1922)) has been considerably weakened by the low place now accorded to presumptions of fact, once contrary evidence has been introduced. Evid. R. 14; *Harvey* v. *Craw*, 110 N.J. Super. 68 (App. Div. 1970), certif. den. 56 N.J. 479 (1970). *Cf. In re Weeks*, 29 N.J. Super. 533 (App. Div. 1954). There, the court noted that a presumption disappears as a factor in the case when substantial evidence of contradiction or explanation has been adduced. *Id.* at 536. Evid. R. 14 does not require "substantial" evidence, merely "evi-

dence to the contrary of a presumed fact," unless reasonable minds could not differ. See *State* v. *Humphreys,* 54 N.J. 406, 414-416 (1969). Here it is clear that Nicholas was not driving the car as the agent of Mrs. Leonard. *Harvey* v. *Craw, supra; cf. Clemens* v. *O'Brien,* 85 N.J. Super. 404 (App. Div. 1964).

Mrs. Leonard testified that never before had she given permission to Nicholas to drive the car. She was frightened into leaving her car. Even if she had realized that Nicholas intended to take over the operation of the car, she left under duress and did not voluntarily consent to his operation. While Mrs. Leonard had not prohibited the operation of the car by Nicholas, we conclude that the "willing mind of the permitter" (*State Farm Mut. Auto. Ins. Co.* v. *Zurich Am. Ins. Co.,* 62 N.J. 155, 168 (1973)) is not present and cannot be inferred in this case.

The substantial issue in the case is whether the NJM policy affords coverage when Nicholas' initial use of the car as a passenger was with permission but was followed by his operation of the car without the owner's permission, express or implied.

In *Selected Risks Ins. Co.* v. *Zullo,* 48 N.J. 362, 373 (1966), as earlier in *Matits* v. *Nationwide Mut. Ins. Co.,* 33 N.J. 488, 496 (1960), it was held that policies insuring motor vehicles registered in New Jersey are deemed to contain the broad omnibus clause required by N.J.S.A. 39:6-46(a). This statute provides that the policy shall "• • • insure the insured named therein and any other person using or responsible for the use of any such motor vehicle with the express or implied consent of the insured • • •." N.J.S.A.39:6-48(b) provides: "The policy

• • • shall not conflict with the provisions of this act • • •." In *Matits, supra,* the court held that:

> • • • if a person is given permission to use a motor vehicle in the first instance, any subsequent use short of theft or the like while it remains in his possession, though not within the contemplation of the parties, is a permissive use within the terms of a standard omnibus clause in an automobile insurance policy. (33 N.J. at 496-497.)

Selected Risks Ins. Co. v. *Zullo, supra,* and *Matits, supra,* both held that the policies afforded coverage despite deviations from the intended use of the vehicle, where permission had been given initially to use *and* drive the vehicle. The deviation in *Zullo* was a trip for a soda, the driver being a minor, and in *Matits* it was drinking at several taverns before returning the car.

Indem. Ins. Co. of North America v. *Metropolitan Cas. Ins. Co. of N.Y.,* 33 N.J. 507 (1960), was decided on the same date as *Matits, supra.* There the court held that a policy covered an accident which occurred while the car was devoted to its intended use, a sales-promotion trip to a brewery, although it was driven by a guest in violation of instructions to the initial driver. The car had been entrusted to an employee of a corporation in which the car's owner had an interest. The Court there noted that the omnibus clause in question "says nothing about *operation* of the vehicle," operation being the "manipulation of the car's controls" or, simply put, driving the car. *Id.* at 513. The clause afforded coverage for "any person while using the automobile • • • provided the actual use is with [the named Insured's] permission." *Id.* Ruling

that an automobile can be used "by one riding in it," although another is the driver, and that the *use* of an auto is broader than its mere *operation,* the Court held that the coverage applied since the vehicle was still being used for the purpose of the trip, although a passenger, with consent of the initial driver, but contrary to his instructions, had taken over the operation of the vehicle. *Id.* Similarly, in *Odolecki* v. *Hartford Accident & Indem. Co.,* 55 N.J. 542 (1970), it was held that coverage is afforded for an accident occurring while the car was driven by someone other than the first permittee (there, a son), despite instructions from the owner to the first permittee prohibiting its use or operation by another. The first permittee, the son, had given his friend permission to drive the car. In the course of its opinion the Court overruled the more restrictive holding of *Baesler* v. *Globe Indem. Co.,* 33 N.J. 148 (1960), in which a prohibition against the *use* by anyone other than the first permittee was given effect. The Court in *Odolecki* noted that the purpose of the statutorily required omnibus clause is to protect the public as well as the named and additional insured. *Odolecki, supra* at 549; see *State Farm Mut. Ins. Co.* v. *Zurich Am. Ins. Co., supra,* 62 N.J. at 180.

In *Odolecki, supra,* and *Indem. Ins. Co. of North America* v. *Metropolitan Cas. Ins. Co. of N.Y., supra,* the omnibus clause included "any person while using the automobile • • • provided the actual use of the automobile is • • • with • • • permission" of the named insured. In the latter case, the Court enunciated the rule that "coverage under an omnibus clause like the one before us depends upon whether the *use,* as distinct from the *operation,* of the automobile is a permitted one." *Id.* at 514-515.

In the case at hand, the clause reads:

> • • • any other person using such automobile with the permission of the named insured, provided his actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission • • •.

This language was intended to preclude coverage of a vehicle which is operated without permission of the owner. It is not a violation of N.J.S.A. 39:6-46(a) to exclude coverage for a person who seizes and operates a vehicle without express or implied permission, notwithstanding that his initial use as a passenger was authorized. N.J.S.A. 39:6-26(c) exempts owners from the requirements as to security or suspension, if their vehicles are *operated* without permission, express or implied.

In the case at hand, where the operation followed a coerced ouster of the owner from the automobile, we conclude that the initial use was superseded by an unauthorized seizure and operation. We do not find it unreasonable to permit an insurance policy to exclude coverage where a person, allowed to use a vehicle as a passenger, has ousted its owner from the vehicle and has taken over its operation without permission, express or implied.

Accordingly, we reverse the judgment insofar as it determined that the NJM policy afforded coverage and that NJM was required to undertake the defense and reimburse MCA for expenses incurred by MCA in its defense of the underlying action.

APPENDIX E

Oral Decision of Kimmelman, J.S.C. (February 5, 1974)

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION—ESSEX COUNTY
DOCKET NO. C-968-71

MOTOR CLUB FIRE & CASUALTY CO.,
Plaintiff,

vs.

NEW JERSEY MANUFACTURERS INSURANCE COMPANY,
FRANCES SCIBETTA, *et al.*,
Defendants.

The Court: All right, gentlemen. At the outset, let me say this: I think you all did a thorough job in preparing the case, as well as an equal job in presenting it to the Court. It is always much easier for a Judge to decide a case and it is much more enjoyable for a Judge to sit and listen to a case when he is readily made aware of the fact that the attorneys before him know everything there is to know about the case. That was obvious to me. I don't say things such as I have said often, but I do so when the occasion merits it and this occasion certainly does.

Appendix E

This is a declaratroy judgment action brought by Motor Club Fire & Casualty Co. against New Jersey Manufacturers Insurance Co. and others for the purpose of determining the question of coverage and duty to defend relative to an accident which occurred on August 26, 1971. Initially, I want to observe that it would have been more appropriate for this matter to have been initiated in the Law Division of the Superior Court rather than the Chancery Division. There seems to be a notion that declaratory judgment actions are equitable in nature and must be brought in the Chancery Division. That is not correct at all. This is a simple legal matter which involves the construction of a contract or the construction of two contracts, depending upon the facts. There is nothing equitable in it and in my view, it should have been brought in the Law Division.

But in any event, the matter has been pretried in the Chancery Division, it has been heard and it will be decided in the Chancery Division. What I said is only to be taken as a passing remark, not necessary for the ultimate decision of this case but perhaps necessary for the future guidance of counsel.

As I indicated, we are here concerned with an accident which occurred on August 26, 1971. On that day, Mrs. Leonard agreed with her next-door neighbors that they would take a trip out to West Caldwell to find out the location of a certain doctor's office. Nicholas Scibetta had an appointment with that doctor later in the evening. The parties here wanted to locate the office in the afternoon so that when they went there later on, they would have no trouble and would be able to go about the journey as expeditiously as possible.

Appendix E

It was agreed that Mrs. Leonard's automobile would be used and so it was. Mrs. Leonard was driving. Nicholas Scibetta's mother, Frances Scibetta, was sitting next to the driver and on the passenger side was sitting Nicholas Scibetta. As they proceeded up Bloomfield Avenue, apparently Mrs. Leonard made a wrong turn to the left. She stopped to ask for directions and was told to get back on Bloomfield Avenue and continue in a westerly direction towards West Caldwell.

As she approached the intersection of Bloomfield Avenue with the street on which she was proceeding preparing to make a left turn, she had her foot on the brake and she suddenly became aware of the fact that Nicholas Scibetta was reaching over from the extreme right-hand passenger side of the vehicle to the steering wheel and said to her, in effect, "Jennie, get out of this car." Jennie, who is Mrs. Leonard, knew, of course, that the purpose of the trip was to locate the office of a doctor who happened to be a psychiatrist. He was to examine and perhaps treat Nicholas Scibetta and to that extent, Mrs. Leonard knew that Nicholas Scibetta had some problem, some mental problem which required medical attention. She knew that the mental condition of Nicholas was something less than stable.

At that point, it is obvious to the Court that she didn't want to put herself in a position of arguing with Nicholas when he said, "Jennie, get out of the car." Nicholas' mother, who was sitting in the center, told Nicholas not to do what he was about to do but obviously, Nicholas paid no attention. Mrs. Leonard put her foot on the brake to stop the car from rolling and she got out. She left her purse in the rear seat. When he got out, the Court finds and infers from the evidence that she knew that

Appendix E

Nicholas Scibetta was attempting to place himself in the driver's seat behind the steering wheel.

So much for the facts. We will deal with the facts later on, except to make one passing reference to what actually happened thereafter. Mrs. Leonard stood on the side on a little center island. She doesn't recall who shut the door, either herself or Nicholas, but in any event, the door was shut and Nicholas drove off and turned on Bloomfield Avenue and a little way up Bloomfield Avenue, there was an accident.

The question now is should Mrs. Leonard's insurance company, New Jersey Manufacturers, be responsible for the happening of the accident and afford coverage or should Nicholas Scibetta's insurance company, Motor Club, be responsible for bearing the insurance? At the outset, we will refer to the Motor Club policy. There is no question that Nicholas Scibetta is an insured under that policy. He is also an insured with respect to this particular accident. The Motor Club policy provides in Part 1, the last paragraph, under the title "Other Insurance," "If there is other insurance against a loss covered by Part 1 of the policy, the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bear to the total applicable limit of liability of all valid and collectible insurance against such loss provided, however, the insurance with respect to a temporary substitute vehicle or not owned automobile shall be excess insurance over any other valid and collectible insurance."

In this case, Nicholas Scibetta, while an insured under the policy, at the time was not driving an owned automo-

bile, he was driving or operating Mrs. Leonard's automobile. If there is valid and collectible insurance with respect to the accident occurring in a non-owned automobile, then MCA's insurance would not be primary but secondary, as I view it. Therefore, we have to determine whether there is valid and collectible insurance covering this non-owned automobile in which Mr. Nicholas Scibetta was at the time. Initially, when the trip started, he was what might be called a user of the car. Thereafter, by reason of what occurred, he became an operator of the car.

The Manufacturers policy provides in Section 1 "The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury to which this insurance applies caused by an occurrence and arising out of the ownership, maintenance or use—of any automobile."

A person insured is defined under Section 2 of that policy "Aside from the named insured, any other person while using an owned automobile or a hired automobile with permission of the named insured provided his actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission."

NJSA 39:6-48B provides that "An insurance policy shall insure any other person using or responsible for the use of any such motor vehicle with the express or implied consent of the insured against loss growing out of maintenance, use or operation" and so forth. The statute doesn't use the word "permission," it uses the words "express or implied consent of the insured."

To end the mystery about what the result will be of this decision, I will tell you and then give you my reasons. I think New Jersey Manufacturers is primarily responsible

for the occurrence in this case and that MCA is secondarily responsible if there is an express verdict over the excess of the Manufacturers limits. I arrive at my conclusion as follows: As I indicated, Section 1 of the Manufacturers policy provides coverage on behalf of the insured for bodily injury which is caused by an occurrence and arising out of the ownership, maintenance or use of the vehicle. Ownership, maintenance or use of the vehicle are not words used in the conjective sense but words used in the disconjunctive sense, so that I can read that clause as "arising out of the ownership or arising out of the maintenance or arising out of the use."

We start with the proposition that Nicholas Scibetta was a user of this particular automobile. He was a user of it with the express rather than the implied consent of Mrs. Leonard. His use later on was converted or extended, I should say, into an operation but his use, nevertheless, continued.

I think the Westchester Fire Insurance Co. versus Continental Insurance Co. case is applicable here. That case, as Mr. Catennacci well knows, was decided by the Appellate decision just a few months ago and it was held that a passenger in a motor vehicle who threw a stick out of the window, injuring somebody, was a user and even though the act of throwing the stick was certainly not with the consent, express or implied, or in the scope of permission of the use, nevertheless the injury did arise out of the maintenance and use of that particular vehicle.

I think the New Jersey cases are very broad in interpreting the word "use." I have in mind *Matits* v. *Nationwide Mutual Insurance Co.,* 33 New Jersey 488, *Small* v. *Schunke,* 42 New Jersey 407, whch cases generally refer

to what is known as an initial permission rule, holding that where the initial use was within the expressed or implied consent of the owner, any other use of the car short of a theft is a permissive use.

As I indicated, even though Nicholas Scibetta was in the act of operating the car at the time of the occurrence here, which gave rise to injuries, he was still using it and his use was, as I also indicated, with the consent of the insured. It is not necessary for me to determine whether the Manufacturers policy is more restrictive than the statute seems to require with respect to coverage. I think my construction placed upon the wording complies with the statute. I think the Westchester fire case, as well as the case of *State Farm Mutual Automobile Insurance Co. versus Zurich,* requires me to place a very broad connotation on the word "use," which I have done.

Beyond that, and while it is not necessary to support this decision, I think some mention should be made of this question of operation with or without the permission of Mrs. Leonard. I think as a general proposition in this state there is a presumption that the operation of a motor vehicle is within the permission of the owner. The cases come up in the context of an agency sense and while the cases do not go off on whether permission has been given, express or implied, they turn on whether the operator was an agent, bearing in mind all the facts and circumstances surrounding the relationship between the parties. Of course, that presumption of agency can be rebutted.

In this situation, we have Mr. Nicholas Scibetta operating the car. In my view, there is an initial presumption that he was operating the car as an agent of Mrs. Leonard or with Mrs. Leonard's permission. It is up to Mrs.

Leonard and her carrier to rebut that presumption. In my view, the carrier of Mrs. Leonard has the burden of proof on that particular issue, not only the burden of going forward, but the ultimate burden of persuasion. I am not satisfied from the evidence that that burden was carired. I have in mind here the fact that Mrs. Leonard and the Scibettas were neighbors for some eleven years, they were quite friendly. On the day in question, it was decided by Mrs. Leonard to use her car for this purpose because it was more convenient, her car being in the driveway at the time. Mrs. Leonard wanted to participate in taking Nicholas and his mother to locate the doctor's office.

She became lost, obviously because of her misdirection; she became flustered, as well, as Nicholas, who became flustered at the prospect of having to go to a psychiatrist. I think under those circumstances, the question of whether Mrs. Leonard denied permission to Nicholas or whether she gave permission to Nicholas to use the car by virtue of her actions is equivocal.

I could draw inferences on both sides of the question and because I can, I therefore say that the ultimate burden of persuasion has not been carried if, in fact, that were necessary.

I only added the last portion to this opinion relating to permissive operation to give you the benefit of my thinking, although it is not necessary to support this decision. As I indicated earlier, Nicholas Scibetta was using the car and his use was with the express consent of Mrs. Leonard and that brings him within the coverage. Therefore, you gentlemen may submit an order for judgment in accordance with what I have said and in the exercise of my discretion, I will not allow costs.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-377

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Petitioner,

vs.

MOTOR CLUB FIRE & CASUALTY CO. and FRANCES SCIBETTA,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

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BRIEF IN OPPOSITION

Respondent, Motor Club Fire & Casualty Co. (hereinafter designated as MCA) files the within Brief in opposition to the Petition for a Writ of Certiorari of petitioner, New Jersey Manufacturers Insurance Company (hereinafter NJM).

Counter-Statement of the Case

Petitioner's statement of the case is substantially correct. Any required amplification or modification of the facts is stated in the Argument following.

ARGUMENT

POINT I

The United States Supreme Court will not consider issues not raised in the courts below.

Counsel for petitioner has vigorously prosecuted its appeal from the Judgment of the Trial Court and through the Appellate Courts of New Jersey. At no time, however, did petitioner ever advance the arguments here predicated as the very basis for the jurisdiction of this Court and as questions for review, namely, the alleged unconstitutionality of N.J.S.A. 39:6-46 and its deprivation of due process.

It is well settled that a petitioner cannot raise issues for the first time on its application for a Writ of Certiorari, since the State courts had had no opportunity to pass upon them. *Monks* v. *New Jersey,* 398 U.S. 71, 26 L. Ed. 2d 54 (1970).

Where, as in the case at bar, the highest state court has failed to pass upon the federal question asserted, it will be assumed that the omission was due to the want of proper presentation in the state courts and this Court would not consider the issue. *Street* v. *New York,* 394 U.S. 576, 22 L. Ed. 2d 572 (1969) on remand 250 N.E. 2d 250, 24 N.Y. 2d 1026. By reason thereof, petitioner's writ is not entitled to consideration on the merits, but even if so considered, is without merit and should be denied.

POINT II

N.J.S.A. 39:6-46 did not impair petitioner's contract of insurance.

At page eight of its Brief, NJM asserts N.J.S.A. 39:6-46 violated the contract clause of the United States Constitution, Art. I, § 10, cl. 1 and thereby required the *wrong* insurance carrier to pay a substantial judgment.

Those assertions indicate a complete misconception not only of the contract clause of the Constitution, but also of the issues involved in this case.

In the first place, the Courts below were not concerned with the fact that there were two insurance carriers in this particular case. They had to deal with the issue of petitioner's coverage of Nick Scibetta as if its policy were the only one involved, because in the next case to arise on point, there might in fact be only one policy. The fact that the MCA policy was available as excess insurance was not seized upon by any of the Courts below as an easy way to avoid resolution of the primary question of the coverage afforded by NJM.

Moreover, counsel overlooks the basic fact that the statute was enacted in 1952, long before this policy of insurance was issued to Mrs. Leonard in 1971. In the interim, the statute had been construed by New Jersey's highest Court in numerous cases and the state law had been well settled that where a policy of insurance did not comply with the requirements of the statute, it would be deemed to be amended so as to conform therewith. *Matits* v. *Nationwide Mutual Ins. Co.,* 33 N. J. 488 (1960), *Odolecki* v. *Hartford Accident and Indemnity Co.,* 55 N. J. 542 (1970), *Selected Risks Ins. Co.* v. *Zullo,* 48 N. J. 362 (1966).

Manifestly, a contract made long after the enactment of a statute would not be impaired by that statute within the

constitutional mandate. Quite the contrary, contracts entered into after enactment of a statute are subject to that law. That has been firmly established ever since it was articulated in the classic case of *Ogden* v. *Sanders,* 12 Wheat 213 (1827) which held that contracts entered into after enactment of a law were not only subject to the law, but would be interpreted as though the law were "a part of" that contract. Similar language is found in *Home Building and Loan Ass'n* v. *Blaisdell,* 290 U.S. 398, 78 L. Ed. 413 (1934).

Accordingly, when NJM issued its policy of insurance in 1971 which contained an omnibus clause more restrictive than the language mandated by the statute, it was aware (or should have known) that its contract was subject to being modified by judicial determination if its chosen language did not comply with that required by the then existing statutory mandate.

By reason thereof, there has been no unconstitutional impairment of petitioner's contract.

POINT III

Petitioner has not been deprived of due process or equal protection of the laws.

On page 11, counsel for petitioner referred to the petition for reargument below as ". . . a meritless, emotional petition for rehearing, grounded *solely* on the fact that the Supreme Court opinion was rendered by six rather than seven justices. . . ." Manifestly, the highest court in New Jersey did not share counsel's characterization, nor is counsel's statement factually correct.

When this case was first called for argument before the Supreme Court of New Jersey, the Chief Justice was

absent because he had disqualified himself. (Apparently because he had previously been a member of the law firm representing NJM).

As counsel correctly states, a hearing by less than a total complement of justices is commonplace in Appellate Court and no objection was made at the time. However, when the Judgment of the Appellate Division was affirmed because the Supreme Court had divided evenly (3-3) on the issues, we applied for reargument on the basis that the question at bar should not be decided by the position of the case at the time the State Supreme Court took jurisdiction thereof. Pursuant to the rules of Appellate procedure of New Jersey, the Supreme Court could have certified the case directly to itself while it was pending unheard in the Appellate Division. If that procedure had been invoked in the case at bar, the resulting division of the Supreme Court would have resulted in the affirmance of the Judgment of the trial court which had previously held against NJM.

The State Supreme Court does not issue opinions on the grant or denial of petitions for rehearing, so that we cannot state with certainty the basis for the grant of rehearing. But the rehearing was allowed.

Certainly, the allowance of rehearing cannot be considered as violating petitioner's rights. The very rules of appellate procedure of New Jersey anticipate and provide the procedure for such action (R. 2:11-6). Moreover, the rules not only contemplate but specifically provide that where appropriate, the Court may summarily redetermine the appeal or amend its opinion.

In this case, the State Supreme Court followed the established practice of designating the senior Judge of the Appellate Division then available to fill the vacancy cre-

ated by the self-disqualification of the Chief Justice. Hence, upon the grant of rehearing at bar, the Supreme Court designated Judge Carton to act as the seventh Justice.

Significantly, there was no objection by NJM to the designation of Judge Carton and the matter was reargued before the Court as thus constituted. Upon reconsideration of the matter, Justice Sullivan (who had previously voted to affirm) voted to reverse the Judgment of the Appellate Division, as did Judge Carton.

Hence, the State Supreme Court thereby reversed its prior holding by a vote of five-two and held, as the trial court did originally, that the policy of NJM afforded coverage to Nick Scibetta. Understandably, while petitioner may have thereby been disgruntled and upset over the result, there was no violation of due process or equal protection of the laws as claimed in its petition for certiorari.

As stated succinctly in *State* v. *Laganella,* 144 N. J. Super. 268 (App. Div. 1976) "due process" in its constitutional sense is little more than metonym for fair play. Certainly there was no absence of fair play in the case at bar. All litigants had received fair and equal treatment. They had had the notice required together with an opportunity to be heard. They were heard, but petitioner did not prevail. By deciding against NJM, it cannot be said that the State Supreme Court thereby deprived the petitioner of its constitutional rights of due process and equal protection of the laws. But, in the final analysis, that is all petitioner has shown as alleged justification for its petition for a writ of certiorari.

CONCLUSION

Wherefore, we respectfully submit that petitioner's application for a Writ of Certiorari be denied.

Respectfully submitted,

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Respondents.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

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Respondents.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION

Frances Scibetta, a respondent, opposes the Petition For A Writ Of Certiorari of New Jersey Manufacturers Insurance Company (hereafter referred to as NJM) and objects to the jurisdiction of the Court to grant the writ.

Opinions Below

Petitioner has properly referred to all opinions and reproduced them in its appendix (Pb1, Pa1 et seq.).

Jurisdiction

Petitioner invokes jurisdiction under 28 U.S.C.A. Section 1257(3) and filed timely.

This respondent objects to jurisdiction and demonstrates the absence of jurisdiction in this brief.

Constitutional Provisions

Petitioner cites the contract clause, the fifth amendment, and the fourteenth amendment. These are set out verbatim in its brief (Pb3). These provisions appear nowhere in the record or official edition. [Rule 40(1)(c)] because they were not raised below.

Concise Statement of the Case

Please refer to the opinion of the Supreme Court of New Jersey, 73 N. J. 425 (Pa3, 4).

ARGUMENT

1. Introduction

The New Jersey Statute (Pa5) which regulates the omnibus clauses of motor vehicle liability insurance policies is N.J.S.A. 39:6-46 (hereafter referred to as the omnibus statute). The language applicable to this litigation is as follows:

> The policy shall . . . insure . . . any other person using or responsible for the use of any such motor vehicle with the express or implied consent of the insured . . . (L. 1952, C. 173, Section 24)

N.J.S.A. 39:6-48(b) provides:

> The policy, any written application therefor and any rider or endorsement which shall not conflict with the provisions of this act shall constitute the entire contract between the parties (L. 1952, C. 173, Section 26)

The latter statute is nothing more than codification of the familiar rule that applicable statutes are implied provisions of any contract.

The applicable language of the (Pa5) omnibus clause of the insurance policy of New Jersey Manufacturers Insurance Company (hereafter referred to as NJM) would provide coverage for:

> . . . any other person using such automobile with the permission of the named insured, provided his actual operation . . . is within the scope of such permission.

The law of New Jersey establishes the perimeter of coverage at *consent to use*. NJM cavalierly narrowed the perimeter to permission to *operate*.

In 1966, the verbatim, identical omnibus clause language in the policy of another insurance company was before the Supreme Court of New Jersey. *Selected Risks Ins., Co.* v. *Zullo,* 48 N.J. 362. The Court found the policy "automatically amended" to conform to the omnibus statute (Pa12). The Court really applied the statute in place of the omnibus clause of the insurance policy which was void because unlawful. The NJM policy in this action was issued around 1970 with the omnibus clause language declared unlawful in 1966.

The "standard omnibus clause" (Pb4) is as illegal in New Jersey as the standard burglary.

The Supreme Court of New Jersey in this action was again obliged to apply the omnibus statute because the policy clause "did impermissibly depart from the statute" (Pa12).

In a thorough and well reasoned opinion, the Court cited well established New Jersey cases holding that *use* is broader than *operation* and that coverage is not vitiated by events occurring after *initial permission* to use is extended.

> "The strong legislative policy which would assure financial protection to innocent victims of automobile accidents, embodied in the mandated omnibus clause and long and consistently invoked by our courts in the 'initial permission' cases, applies with no less force to the present situation." (Pa15)

The act which contains the omnibus statute is given an official title by N.J.S.A. 39:6-23, as follows:

> This act shall be known and may be cited as the "Motor Vehicle Security Responsibility Law".

In linking coverage with use, the New Jersey omnibus statute is similar to that of other states. For example, New York and California:

> Provision affording insurance to the named insured with respect to any motor vehicle covered by such policy, and to the same extent that insurance is afforded to the named insured, to any other person using, or legally responsible for the use of such motor vehicle, provided such use is by the named insured or with his permission, express or implied, and within the scope of such permission . . . *California Insurance Code,* 43 *Annotated California Codes,* §115 80.1(b)(4).
>
> No policy or contract of personal injury liability insurance . . . covering liability arising from the ownership, maintenance, or operation of any motor vehicle . . . shall be issued . . . unless it contains a provision insuring the named insured against liability for death or injury sustained . . . as a result of negligence in the operation or use of such vehicle by any person operating or using the same with the permission, express, or implied of the named insured. *McKinney's Consolidated Laws of New York, Book 27, Insurance Law, §167.*

Financial responsibility of motor vehicle owners and operators and the scope of their liability insurance coverage are manifestly matters of tremendous public importance which are subject to the police powers of the States. In the motor vehicle field, as in others, the exercise of police power by statute may have the effect of nullifying some contractual provisions. The police power is supposed to do that if necessary. There is no claim that the NJM omnibus clause predated the omnibus statute and such is not the case. It is difficult to perceive

a constitutional issue in the Petition For Writ of Certiorari. No claim involving the Constitution was previously asserted in this action, nor has this writer seen any case in any state which has raised a constitutional issue with respect to any omnibus clause or statute.

Petitioner's simplistic argument (Pb9 and 10) on the subject of reasonableness of the legislative policy of New Jersey in essence is that if one insurance policy meets legislative requirements, another is constitutionally exempt. Except to note that N.J.S.A. 39:6B-1 (Pb9) (L. 1972, C. 197, effective January 1, 1973) became effective more than a year after the accident in question (August 26, 1971) (Pb3), this argument which totally ignores the interest of the state in regulating the scope of coverage need not be dignified by further discussion.

In *United States Trust Company* v. *State of New Jersey, et al.*, 45 LW 4418 (Pb8), this Court applied a three step analysis: The Court first inquired whether or not an impairment had occurred. The Court determined that there had been impairment. The Court, secondly, distinguished contractual relations to which the State was a party and those to which it was not and noted that financial contractual relations involving the State were involved. The third step was to decide whether or not the impairment was unconstitutional. The majority held that the Constitution had been violated.

(1) In this action, there has been no impairment. The omnibus statute antedated the particular omnibus clause by many years. The New Jersey Supreme Court did not work an impairment. It simply applied the omnibus statute and prior interpretation thereof. The constitutionality of the statute was never questioned at any stage of the New Jersey proceedings. (2) Assuming *arguendo* that an impairment be present, this action does not involve financial contractual relations to which the State was a party and, therefore, significantly differs from *United States Trust Company, supra.* (3) A long, firm line of cases of this Court holds that the legitimate, reserved police power of the State does not yield to claim of constitutional impairment. "Once we are in this domain of the reserve power of a State we must respect the 'wide discretion on the part of the legislature in determining what is and what is not necessary.'" *El Paso* v. *Simmons,* 379 U.S. 497 (1965), 508.

Resort to this Court is literally an afterthought, since not one word about constitutionality has previously, been written or heard in this action.

The claim that the omnibus statute violates other constitutional rights, unsupported by authority, is frivolous.

Against this historical and analytic background, with this action in the posture described, NJM petitions for writ of certiorari.

2. Jurisdiction to grant certiorari is absent pursuant to controlling cases

The validity of the omnibus statute on the ground of its being repugnant to the Constitution of the United States was not "drawn in question" [28 U.S.C.A. Section 1257 (3)] before filing of the Petition For Writ of Certiorari. Thus, the United States Supreme Court lacks jurisdiction to review. Mindful of its concern for issues meeting the requirements of Rule 19, this Court has always been flexible in deciding whether or not a federal issue has been properly *drawn in question* in state court proceedings. In effect, the Court has applied the standard of what common sense would tell any reasonable jurist. Perhaps the

outer limit of this approach is represented by *Annonymous* v. *Baker,* 360 U.S. 287, 288 (1959), in which right to counsel was obviously involved although that issue was not specifically raised in pleadings or expressly passed upon in the state courts. See also *Chambers* v. *Mississippi,* 410 U.S. 284, 289, (1972) in which petitioner's federal claim arising out of evidentiary rulings was first raised in his motion for new trial and then in his appeal to the State Supreme Court.

Within the outer limit of jurisdiction, this Court has made rulings which are as clear as they are fair and reasonable. In *Commercial Bank* v. *Buckingham's Executors,* 5 How 317, 341, it was held that "it must appear, by clear and necessary intendment, that the question must have been raised, and must have been decided, in order to induce the judgment."

Oxley Stove Co. v. *Butter County,* 166 U.S. 648, 655, (1897):

> "Upon like grounds the jurisdiction of this court to reexamine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right."

In *Bailey* v. *Anderson,* 326 U.S. 203 (1945), petitioner raised his constitutional claim in the Virginia Supreme Court of Appeals which did not rule on it and accordingly his appeal to the United States Supreme Court was dismissed for want of any properly presented substantial federal question. Nor was it regarded as a Petition for Writ of Certiorari.

Radio Station WOW v. *Johnson,* 326 U.S. 120, 128 (1945):

> "Questions first presented to the highest State Court on a petition for rehearing come too late for consideration here . . ."

CIO v. *McAdory,* 325 U.S. 472, 477 (1945):

> "Since the State Supreme Court did not pass on the question now urged, and since it does not appear to have been properly presented to that court for decision, we are without jurisdiction to consider it in the first instance here."

Street v. *New York,* 394 U.S. 576, 582 (1969):

> "Moreover, this Court has stated that when, as here, the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary."

Monks v. *New Jersey,* 398 U.S. 71 (1970):

> "The further claim advanced by petitioner's appointed counsel in this Court respecting the alleged unconstitutional application of N.J. Stat. Ann. § 2A: 4-37(b) has been raised for the first time upon this writ and the state courts have had no opportunity to pass upon it.
>
> "Accordingly we conclude that the writ of certiorari should be dismissed as improvidently granted, without prejudice to any further appropriate proceedings below."

In this action, there has not been the slightest suggestion of any federal issue in the state court proceedings. It was apparent from the time briefs were submitted to the

trial judge that the adversaries of NJM claimed that the NJM omnibus clause flagrantly violated the New Jersey omnibus statute. A rejoinder that the relevant provision of the omnibus statute is unconstitutional could have been introduced at any time thereafter at any tier of the New Jersey Court system.

Decisions of this Court establish beyond any doubt that it is bound by a State's interpretation of its own statute. *Coleman et al.* v. *Alabama,* 399 U.S. 1, 9 (1970); *Garner* v. *Louisiana,* 368 U.S. 157, 166 (1961); *Cramp* v. *Board of Public Instruction of Orange County,* 368 U.S. 278, 285 (1961); See also *Kingsley International Pictures Corp.* v. *Regents,* 360 U.S. 684, 688 (1959); *Albertson* v. *Millard,* 345 U.S. 242, 244 (1953); *United States* v. *Burnison,* 339 U.S. 87; *Aero Transit Co.* v. *Commissioners,* 332 U.S. 495. No matter what a court of New Jersey might decide or has decided, its interpretation "puts these words in the statute as definitely as if it had been so amended by the legislature." *Winters* v. *New York,* 333 U.S. 507, 514. Thus, a constitutional issue cannot remain inchoate until the highest state court interprets it because such interpretation, past or present, is simply regard das part of the statute, which must properly and colorably be *drawn in question* in order to furnish jurisdiction for this Court to exercise its discretionary power to consider review. A canvass of the contract clause cases cited in *United States Trust Company* v. *State of New Jersey, supra,* reveals that none of these cases reached the Supreme Court without prior presentation of the federal issue in courts below.

The contention that unconstitutional impairment did not occur until the final state court ruling (Pb11) defies belief, particularly since the same alleged impairment must have occurred when the trial judge ruled against petitioner. It is a truism that you don't lose a case until the last court has ruled, but this does not excuse the failure to raise the federal issue timely and properly.

Citing *Barrows* v. *Jackson,* 346 U.S. 249 (1953), petitioner accepts the principle that the impairment clause applies to legislation, not to judgments. It then (Pb11) "submits that where, as here, a state court operating under what it has deemed a 'legislative directive' gives force to a statute thus impairing the contract obligation, jurisdiction of this Court attaches. *Columbia Railway Gas & Electric Co.* v. *South Carolina,* 261 U.S. 236 (1923)." This, indeed, is the holding of *Columbia Railway.* In that case the respondent State contended that the state Supreme Court judgment did not depend upon the statute complained of. This Court ruled that "in real substance and effect, force has been given to the statute complained of . . ." (261 U.S. 245). Jurisdiction was found under the rule reiterated at 261 U.S. 244:

> "As this Court has repeatedly ruled, the Constitution affords no protection as against an impairment by judicial decision."

The Court significantly, however, noted the jurisdictional history of the case at 261 U.S. 246:

> "The sufficiency of the complaint was challenged by demurrer upon the ground, among others, that the contract in question was impaired by the Act of 1917. The demurrer having been overruled, an answer was filed, alleging such impairment and this claim was asserted and insisted upon at every stage of the proceedings to their conclusion in the State Supreme Court."

The failure in the instant action of NJM to raise the federal issue at any stage of the proceedings does not require repetition.

When cited in full context, the passage from *Tidal Oil Co.* v. *Flanagan,* 263 U.S. 444, 453 (1924), quoted by NJM at page 11 of its brief, illuminates another distinction between cases properly showing jurisdiction and the instant action.

> "Other cases cited are *Louisiana* v. *Pilsbury,* 105 U.S. 278, and *Muhlker* v. *New York & Harlem R.R. Co.,* 197 U.S. 544, but in each of them a statute had been passed subsequently to the contract involved and was held to impair it. In such a case this Court accepts the meaning put down upon the impairing statute by the state court as authoritative, but it is the statute as enforced by the State through its courts which impairs the contract, not the judgment of the Court."

If petitioner contends that the judgment of the New Jersey Supreme Court, independent of statute, confers jurisdiction, this has never been the law. If it complains of the omnibus statute, jurisdiction does not attach because no federal issue was properly raised, and there has been no impairment so far as the contract clause is concerned.

3. Jurisdiction to grant certiorari is absent pursuant to Rules 19 and 23

Assuming, *arguendo,* that petitioner had properly proceeded on the federal issue in the state courts, this action, nevertheless, fails to meet criteria of the Rules of the Supreme Court. "Special and important reasons" are not demonstrated. Rule 19. Clearly, a state court has *not* "decided a federal question of substance . . ." Rule 19 (a).

Rule 23 (1) (b) requires petitioner to specify "the stage of the proceedings in the court of first instance and in the

appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g. by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court, such pertinent quotations of specific portions of the record . . . as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari." Petitioner has not made the required showing because it cannot. Moreover, petitioner has not even attempted to demonstrate how or why this Court can find jurisdiction or relax its jurisdictional criteria where the jurisdictional standards of firm case law and Court Rules cannot be met.

This petition involves a disgruntled insurance carrier which violated the state motor vehicle code. The action does not involve the type of issue contemplated by Rule 19. Moreover, the regressive ruling sought by petitioner would abrogate the long settled scope of omnibus coverage in New Jersey and elsewhere to the detriment of thousands of persons presently uninjured and even unborn.

4. Jurisdiction is likewise absent with respect to petitioner's claims arising out of the grant of rehearing in the New Jersey Supreme Court

Petitioner's assault upon the grant of rehearing by the Supreme Court of New Jersey (unsupported by citation) suffers from the same jurisdictional defects stated above. Some additional facts are required to controvert petitioner's argument, assuming some color of jurisdiction be present.

Chief Justice Richard Hughes did not sit at the first hearing in the New Jersey Supreme Court. No reason for his absense has ever been stated, nor was his absence announced in advance. Respondents assumed that he did not sit because NJM was represented by the law office in which he was a partner before his appointment as Chief Justice, the same office representing petitioner now. His assumed disqualification was a moot matter until the six remaining justices divided equally. It was respondents who under these unusual circumstances were denied equal protection of the law, and this point was respectfully made in the motion for rehearing (Ra1) which also stressed that the one sentence ruling of the divided Court (Pa 25) violated the Court's own rule governing form of opinions. Respondents had been denied a full Court because of prior relationships of the Chief Justice, and the ruling of the Court did not fairly constitute even one bite "of the apple" (Pb 12). The Court graciously granted a rehearing before a full Court (Pa 22) and assigned Justice Carton to complete the Court (pursuant to Court Rule providing that power).

It is significant that in the process of the Court's deliberation over an opinion in proper form, Justice Mark A. Sullivan changed his vote, and the final vote was 5 to 2 in favor respondents (73 N.J. 443), Justice Carton also voting for respondents.

The New Jersey Supreme Court did not state reasons in its order granting the rehearing (Pa 22). In the final opinion, it stated (73 N.J. 428, Pa 2):

> "In order to resolve this important issue, we granted rehearing, 73 N.J. —— (1976)."

In effect, the Court noted the motion for rehearing and pursuant to its supervisory powers, granted a rehearing

sua sponte, to provide the hearing and ruling in the form which should have obtained on the first hearing. There was no constitutional infirmity in this procedure which resulted in an untainted and unambiguous decision.

CONCLUSION

The constitutional claims of petitioner do not demonstrate colorable merit. Petitioner has egregiously failed to meet a single jurisdictional requirement of case law, statute, and Court Rule. This respondent respectfully prays that this vexatious petition be denied.

Respectfully submitted,

JUDSON L. LEVIN,
Counsel for Respondent,
Frances Scibetta.

[APPENDIX FOLLOWS]

APPENDIX A

Petition for Rehearing in the Supreme Court of New Jersey

(Filed—October 27, 1976)

SUPREME COURT OF NEW JERSEY

A-15/16 September Term 1976

MOTOR CLUB FIRE & CASUALTY COMPANY,

Plaintiff-Respondent and Cross-Appellant,

vs.

NEW JERSEY MANUFACTURERS INSURANCE COMPANY,

Defendant-Respondent,

and

FRANCES SCIBETTA,

Defendant-Appellant.

To: McElroy, Connell, Foley & Geiser, Esqs.
Attorneys for New Jersey Manufacturers Insurance Company
Gateway I
Newark, New Jersey

Appendix A

Lieb, Teich and Berlin
Attorneys for Motor Club Fire &
Casualty Co.
161 Madison Avenue
Morristown, New Jersey

SIRS:

Take Notice that Frances Scibetta herewith files her Petition for Rehearing.

PROOF OF SERVICE

I CERTIFY that I mailed two true copies of the annexed Petition for Rehearing and Brief of Frances Scibetta to the attorneys above named at the addresses there shown by ordinary mail on the 27th day of October, 1976.

/s/ JUDSON L. LEVIN
Attorney for Frances Scibetta

BRIEF STATEMENT AND ARGUMENT OF GROUND RELIED UPON

Oral argument in this action took place on September 28th, 1976. The Chief Justice did not sit nor did he participate in the decision of the Court. By order dated October 20, 1976, an equally divided Court affirmed the judgment of the Appellate Division. I respectfully assume that the Chief Justice chose not to sit in this action because New Jersey Manufacturers Insurance Company (N.J.M.) is a client of this former law office which represented N.J.M. in this action. Code of Judicial Conduct, Canon 3C; R.1: 12-1. If so, such decision is consistent with the highest standards of judicial conduct.

Appendix A

Any vote other than equal division would have left the disqualification moot. Only at this posture of the case has the absence of the Chief Justice become critical. By the fortuity of an equally divided court, an opinion of the Appellate Division is affirmed.

The subject of this action is of such importance that this Court, including the Chief Justice, granted the petitions for certification. The importance of this case to Frances Scibetta requires no emphasis. Her cause has been lost through mechanism not provided for by the Court Rules, a disqualifying Justice and the result of equal vote. If the assumption respectfully made above be true, she has been denied the treatment afforded other litigants appearing before this Court. She has been denied equal protection of the law because she has not received the hearing from this Court which any other litigant whose appeal did not involve a former client of a Justice or a former law firm of a Justice would receive. If the Chief Justice would have voted or should vote for affirmance, the result would be the same. If the Chief Justice, however, would have voted or should vote for reversal, his abstention clearly affects the outcome of this action, the law of the State and, secondarily, the law nationally. The pathos and feeling of injustice arising from this situation can be illustrated in the following reconstruction of my conversation with my client.

> Mr. Levin: Mrs. Scibetta, I'm very sorry to report that we lost your appeal in the Supreme Court.
>
> Mrs. Scibetta: Mr. Levin, I read in the newspaper that three judges voted against us and that this means we lost the case. How does this happen?

Mr. Levin: To my knowledge the rule followed by Appellate Courts in an equal vote is that the decision of the lower court is affirmed.

Mrs. Scibetta: Aren't there seven judges on the Supreme Court?

Mr. Levin: Yes. The Chief Justice did not participate in the decision.

Mrs. Scibetta: Why not?

Mr. Levin: I believe that he disqualified himself because N.J.M. is a client of his former law office and was represented by that office.

Mrs. Scibetta: Do you think that he would have been prejudiced against us?

Mr. Levin: No.

Mrs. Scibetta: If he had voted for us, would we have won the case?

Mr. Levin: Yes.

Mrs. Scibetta: Then we may have lost the case because his law office and old client were on the other side?

Mr. Levin: Yes.

Mrs. Scibetta: Would he have heard my case if another insurance company and another law office had been on the other side?

Mr. Levin: I think so.

The conditions responsible for the less than equal hearing accorded Mrs. Scibetta are unusual but not unlikely to recur. They are:

1. An equally divided Supreme Court.

2. A disqualifying Justice.

3. A large insurance company continually involved in litigation.

4. A large law firm continually involved in litigation.

It is submitted that this distinguished Court has the power to furnish Mrs. Scibetta the same hearing which other litigants have when former law firms or clients of a Justice are not involved.

A simple solution is provided when a trial judge is disqualified. The status quo (unlitigated before a trial) is not simply preserved. Another judge is designated. R. 1:12-3(a). The Rules are silent on designating a judge to sit in place of a disqualified appellate judge. The reason for this omission most likely is that such instances are rare and a quorum can usually be convened. A quorum cannot provide equal justice for Mrs. Scibetta, because under comparable conditions another litigant's cause would be decided by seven Justices.

The unsatisfactory nature of the disposition of this appeal is emphasized by the fact that the form of disposition violates the rules of the Court. R. 2:11-3(a) provides for a written opinion. The one sentence disposition of the Court is not an opinion; it is an announcement of deadlock. Numerous Supreme Court opinions adopt the Appellate Division decision but do so by majority vote. R. 2:11-3(e) provides for *Affirmance Without Opinion.* This rule is clearly limited to the Appellate Division.

Affirmance by equally divided court, since not provided by Court Rule, must then be an administrative practice of convenience. Other solutions are conceivable. Providing equal justice to Mrs. Scibetta is likewise an administrative matter. Thus, this petition does not involve substantive issues previously argued, and for that reason the provisions of R. 2:11-6(b), do not apply to this petition. Rather, this petition seeks administrative relief for the substantive reasons occasioned by the deadlock.

Appendix A

RELIEF REQUESTED

The Chief Justice administers all courts (R. 1:33-1) and is presiding Justice of the Supreme Court (R. 2:13-1). He has the power to constitute the Supreme Court to provide equal justice to Mrs. Scibetta, the lack of which could not be apparent until the Court divided equally because one Justice disqualified himself, in this case the Chief Justice himself. Two solutions occur to this counsel:

1. Relax R. 1:12 (Disqualification) pursuant to R. 1:1-2 (Relaxation) since "adherence to it would result [has resulted] in an injustice" (R. 1:1-2). The disqualified Justice should reconsider his disqualification on giving the other Justices and/or counsel an opportunity to be heard. If he determines that he can sit fairly and impartially, he should sit.

2. If he determines that he cannot sit fairly and impartially, or in any event, the Chief Justice can assign a judge "to expedite the business of the Court" pursuant to R. 2:13-2(a).

A rehearing before seven Justices, or in the alternative, before one more Justice is sincerely and respectfully requested.

CONCLUSION

It is ironic and truly unbearable that Frances Scibetta, the victim around whom litigation has swirled, should be denied equal justice before this Court because her adversary is represented by an outstanding law firm which counts a distinguished member of this Court among its

Appendix A

alumni. A rehearing or continued hearing with seven Justices is required to afford her the hearing which any other litigant would have.

Respectfully submitted,

JUDSON L. LEVIN

CERTIFICATION

I certify that this Petition is submitted in good faith and not for purposes of delay.

JUDSON L. LEVIN

DATED: October 27, 1976